ENFORCEABILITY OF DIVORCE DECREE PROVIDING FOR RELIGIOUS EDUCATION OF CHILD

Hackett v. Hackett

77 Ohio L. Abs. 98, 146 N.E.2d 477 (1957)

*Aff'd, No. 5073, Sixth Dist. Ct. App., May 19, 1958**

A child's non-Catholic mother and her Catholic father executed a separation agreement awarding custoday to the mother and providing for the child's attendance at a Catholic school previously approved by the mother.[1] Thereafter the mother obtained an uncontested divorce and the separation agreement was incorporated into the decree, *although not approved by the Court.*[2] The mother entered the child in the Catholic school where she completed the first grade, but the following term sent her to public school. The divorced father filed a motion to show cause why the mother should not be punished for contempt of court, alleging violation of the decree. The common pleas court for Lucas county denied the motion, finding the mother not guilty of contempt. The court of appeals affirmed, holding that the mother could not be compelled to send her child to the Catholic school by any means since the provision of the separation agreement embodied within the decree was void and the court order incorporating it unenforceable.[3]

The judicial attitude controlling this issue is articulated *not* in terms of the parties' formalized agreement subsequently incorporated into a court decree, but rather in the court's reluctance to override constitutional limitations within the Ohio Bill of Rights and judicial adherance to a policy that agreements concerning religious training of children are family matters *not* justiciable, between the martial parties—before or after divorce. Since an unwilling parent may not be compelled to act in matters of religious conscience the formal jural acts of the parties are disregarded. The result is that a parent loses the right to direct the mode of religious indoctrination for his child when he loses custody through the processes of separation and divorce.

The mutual rights to determine the religion of children exist solely

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*Motion to certify filed in the Ohio Supreme Court.

[1] Prior to marriage the parties had executed an antenuptial agreement providing that "all children born issue of the marriage shall attend the Catholic school and be brought up in the Catholic faith."

[2] The agreement was incorporated by reference as follows: "[T]hat said written agreement as to the custody, control, education, religious training and supervision of said minor child . . . be and the same is hereby adopted . . . as the decree of this Court as though fully rewritten herein. . . ."

[3] Hackett v. Hackett, No. 5073, Sixth Dist. Ct. App. (Judges of the Eighth District sitting by designation), May 19, 1958, *affirming,* 77 Ohio L. Abs. 98 146 N.E.2d 477 (1957).

in the parents while married,[4] and this includes the privilege of prescribing sectarian education.[5] If marriage is between Catholic and non-Catholic parties, conformity to church procedure is customary for *sanctioned* Catholic marriage. In accordance with Catholic policy, the non-Catholic party must promise to raise all children in the Catholic faith alone.[6] When the marital relation is abandoned or dissolved, the children's religious status may raise an issue between the parties, and in keeping with Catholic doctrine one parent may want to perpetuate the child's religious course. *If* by agreement the Catholic parent does *not* receive custody of the child, a stipulation for religious training may be provided. Whether the agreement seeks to regulate the raising of the child in the Catholic faith, or provides for attendance at a Catholic school, analysis rests upon the same criteria since parochial education by its very nature imparts religious indoctrination to at least the same degree as parental supervision alone.[7]

Upon repudiation of the agreement by an unwilling parent the legal

[4] While English courts followed the doctrine of *"Religio Sequitur Patrem,"* see *In re* Agar Ellis, L.R. 24 Ch. Div. 317, 13 Eng. Rul. Cas. 30 (1883), equality of spouses in the United States requires a different approach; see Friedman, *Religious Education of a Child,* 29 HARV. L. REV. 485 (1916). A child who is subject to parental custody has no independent right to control its own religious upbringing, Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333 (1955); see Prieto v. St. Alphonsus Convent of Mercy, 52 La. Ann. 631, 27 So. 153 (1900).

[5] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[6] THE CODEX JURIS CANONICI (1918), a body of law governing the moral behavior of all Catholics, prescribes that Catholics who marry "outside the Church" are generally forbidden to partake of the Sacraments (Canon 2375), and states that "The Church everywhere most severely forbids the contracting of marriage between two baptized persons of whom one is a Catholic whereas the other is a member of a heretical or schismatical sect; and if there is danger of perversion for the Catholic party and the children, the marriage is forbidden also by the divine law itself" (Canon 1060). *Dispensation* in mixed-faith marriages is set forth in part by Canon 1061—"The non-Catholic party shall have given a guarantee to remove all dangers of perversion from the Catholic party, and both parties shall have given guarantees to baptize and educate all the children in the Catholic faith alone. . . ." While not mandatory, resort to formal written contracts is the general practice. See WHITE, CANONICAL ANTENUPTIAL PROMISES AND THE CIVIL LAW (1934). Allred, *The Legal Status of the Ante-Nuptial Promise Before Mixed Marriage,* 12 JURIST 1 (1952), illustrates several forms currently in use.

[7] ". . . Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place . . . (Canon 1372)," WOYWOD, THE NEW CANON LAW, UNDER IMPRIMATUR OF MOST REV. FRANCIS J. SPELLMAN, ARCHBISHOP OF NEW YORK AND OTHERS (1940). In Everson v. Board of Education, 330 U.S. 1, 24 (1947), Mr. Justice Jackson, dissenting, observed: "Its (the Roman Catholic Church) growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests . . ." and stated "I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church."

issue raised is whether a child's religious training can be predetermined by agreement and subjected to judicial enforcement. The majority of courts have insisted that any provision of this type is void.[8] Separation and divorce apparently divest the non-custodial parent of his religious influence, and the parent in custody decides religious elements in the child's life according to individual judgment. The rationale of the decisions rests largely upon the welfare of the child;[9] it would be inconsistent with well-being to coerce a parent to indoctrinate a child to any degree in a religion unapproved by that parent.[10] While most arguments in favor of enforcement are prevalent in non-judicial utterances,[11] a minima of cases have enforced these promises *via* canonical interpretations and contractual analysis.[12] Sounder reasoning in later decisions apparently overrules any effect these cases would seem to have,[13] the conclusion being that a child's religious training may be *assured* only through extra-judicial negotiation and by means of efforts to preserve the marriage.

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[8] *In re* Guardianship of Walsh, 114 Cal. App. 2d 82, 249 P.2d 578 (1953); Stanton v. Stanton, 100 S.E.2d 289 (Ga. 1957); Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920); Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910); Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953); *In re* Butcher's Estate, 266 Pa. 479, 109 Atl. 683 (1920); TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA (1948); EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 954-956 (1952). See Friedman, *supra* note 4; Pfeffer, *supra* note 4.

[9] The welfare rationale is succinctly stated in Stanton v. Stanton, *supra* note 8, at 292: "In those jurisdictions which have dealt with the question it is generally held that the welfare of the child is the controlling fact in determining the right to its custody, and for this reason contracts between the parents concerning the religious training of their children will not be enforced, and the parent to whom custody is awarded is not bound by the previous contract." See also 2 RESTATEMENT OF CONTRACTS §583(2) (1932); 67 C.J.S., 646-667 (1950).

[10] "The parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child.... To create a basic religious conflict in the mind of the child, and between it and its custodian, would be detrimental to its welfare." Boerger v. Boerger, *supra* note 8, at 104, 97 A.2d at 427.

[11] See, *e.g.*, WHITE, CANONICAL ANTENUPTIAL PROMISES AND THE CIVIL LAW (1934), WHITE, THE LEGAL EFFECT OF ANTENUPTIAL CONTRACTS IN MIXED MARRIAGES (1932), MURRAY, *Equity and the Antenuptial Contract,* 6 CATHOLIC U.L. REV. 169 (1956), Allred, *supra* note 6.

[12] Shearer v. Shearer, 73 N.Y.S.2d 337 (1947), and Ramon v. Ramon, 34 N.Y.S.2d 100 (1942), stressed the enforceability position. 6 WILLISTON, CONTRACTS §1744a, n. 3 states: ". . . Agreements between parents relating to the religious training of their children are generally upheld. . . ." However the cases cited in support of the statement *refused* to enforce the agreements; see criticism in Pfeffer, *supra* note 4.

[13] The New York Court of Appeals in Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954), disregarded an antenuptial agreement subsequently incorporated into a divorce decree providing for the child to be raised in the Catholic faith because it would be detrimental to the child's welfare. See Stanton v. Stanton, *supra* note 8, which took the same approach.

Contempt as a method of enforcement has not often been raised, for it necessitates incorporation of the agreement into the divorce decree, which is not always the case. Recently the Supreme Court of Iowa was confronted with facts parallel to the instant litigation; there the position regarding the enforceability of a separation agreement incorpo-Roman Catholic Religion."[14] The court held that specificity of the decree was a condition precedent to enforcement and since the *quantum* of religious upbringing was ambiguous, the parent could not possibly know what was required and contempt could not lie.[15] The general position regarding the enforceability of a separation agreement incorporated into a divorce decree has been recently asserted by the Ohio Supreme Court in *Robrock* v. *Robrock;*[16] the agreement is *superseded* by the decree and enforceable *as such.* While it was argued that this holding controls the religious agreement issue, the appellate court in the present case refused to apply the *Robrock* reasoning because the religious promise as such was never legally enforceable. The appellate court emphasized that the present decision concerns matters *wholly* of a religious nature whereas the *Robrock* case concerned only secular interests.[17]

Because the courts have seized upon other grounds of decision, the basis for judicial disposition of the issue on the constitutional level has not been effectively articulated. The common pleas court in the instant case decided that the judiciary was powerless to enforce the provision of the divorce decree because the Ohio Constitution forbids compulsion to support any form of worship and interference with rights of conscience.[18] The analysis is that when a mother sends her child to a Catholic school she supports the Catholic faith, and forcibly compelling her to do so would violate the constitutional mandate. Implicit in the court's reasoning is the supposition that parochial school systems indoctrinate the pupil with religious tenets.[19]

> It is impossible for us to see how the State, through this or any other court, may employ the strong arm of the law to compel the mother to act contrary to her conscience in any matter pertaining to religion. It should be axiomatic that neither con-

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[14] Lynch v. Uhlenhopp, 78 N.W.2d 491 (Iowa 1956).

[15] The facts of the principal case are distinguishable since attendance at a *specific* school was provided; *cf.* Hardin v. Hardin, 65 Ohio L. Abs. 538, 115 N.E.2d 167 (1952).

[16] 167 Ohio St. 479 (1958).

[17] *Ibid.* In the *Robrock* case the court enforced a contractual obligation in a separation agreement, subsequently incorporated into a decree, which provided for the continuation of insurance and the cost of education for the children beyond their twenty-first birthday.

[18] OHIO CONSTITUTION, art. I, §7 ". . . No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent . . . nor shall any interference with the rights of conscience be permitted. . . ."

[19] See *supra,* note 7.

> tract nor court order can deprive her of the right to change her mind where religion is involved.[20]

While the court of appeals reasserts the constitutional predicate stressed in the lower court, welfare and policy considerations are viewed as augmenting this basis, foreclosing any judicial enforcement of this type of agreement. This conclusion is premised upon the fact that the agreement was unenforceable at the time it was made and divorce did not therefore change its stature. The position stated is thus in accord with the majority of jurisdictions, appraising and adopting the rationale of those cases which refused enforcement, in terms of the principal case.[21]

This precise issue has heretofore not been raised in reported opinions within this state, except by way of *obiter*.[22] However, it seems inconceivable that judicial enforcement would not ultimately raise the issue of *unconstitutional* compulsion and violate the welfare-policy nexus. For this reason the decisional rationale can easily be extended beyond the facts of the instant case. The indicia stressed would deny enforcement to *any* agreement designed to control religious destiny *in general*, against the wishes of the parent in custody.[23]

Beyond the restrictions of the Ohio Constitution, the Federal Constitution would seem to provide the most comprehensive barrier to enforcing religious indoctrination agreements. By the prohibition of the

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[20] Hackett v. Hackett, Ohio L. Abs. 98, 103, 146 N.E.2d 477, 482 (1957).

[21] The court of appeals approved the reasoning in Jackson v. Jackson, 181 Kan. 1, 309 P.2d 705 (1957); Stanton v. Stanton, *supra*, note 8; Lynch v. Uhlenhopp, *supra* note 14; Boerger v. Boerger, *supra* note 10; People *ex rel.* Sisson v. Sisson, 271 N.Y. 285, 287, 2 N.E.2d 660 (1936).

[22] *In re* Luck, 10 Ohio Dec. 1 (Prob. 1899), involved the appointment of a guardian after the death of the Catholic mother and non-Catholic father. The court held that since the non-Catholic father had raised the child several years after his wife's death, the child's welfare would best be served in the hands of his father's non-Catholic relatives. The opinion contains the dictum at 4: "As between the parties to this marital relation, when the wife was living, the binding force and inviolability of this compact (antenuptial agreement to raise children Catholic) would be recognized by all courts, and sanctioned by the moral sense of all mankind." In a recent case, Angel v. Angel, 2 Ohio Op.2d 136, 74 Ohio L. Abs. 531, 140 N.E.2d 86 (1956), the common pleas court for Madison county took an *opposite* approach from the principal case. There, subsequent to divorce, a Catholic father who had his child's custody moved the court to change his former wife's visitation rights each week so that she could *not* take the child to a Protestant Church on Sunday. The court denied the motion, quoting the Ohio custody statutes, OHIO REV. CODE §§3109.03 (1953), 3109.04 (1953), 3105.21 (1953), holding in effect that the rights of the parents are equal *after* divorce, and that the court under the above statutes could not prevent any particular form of worship. The constitutional question was *not* raised.

[23] Dicta in the present case indicate that not only would an agreement to educate a child in a parochial school be unenforceable, but an agreement to *raise* or *rear* a child in a particular religion (as in the antenuptial agreements) would raise the same question of unenforceability.

first amendment as incorporated into the fourteenth in this context,[24] *neither* state nor federal government ". . . can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion."[25] This being so, as regards the individual himself, it follows that this guaranty would apply with equal strength to teaching children how to worship. Premised upon these bases, under the predicate of *Shelly v. Kraemer*[26] it would seem that judicial enforcement by a state court of a promise to indoctrinate one's child in a faith repudiated by the parent would be state action violating the fourteenth amendment.[27]

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[24] McCollum v. Board of Education, 333 U.S. 203 (1948).

[25] Everson v. Board of Education, *supra* note 7, at 15. In accord is the constitutional doctrine that a parent has the right to have its child educated without *any* religious teachings. McCollum v. Board of Education, *supra* note 24. Mr. Justice Frankfurter's concurrence in the *McCollum* case, at 216 noted: "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered."

[26] 234 U.S. 1, 3 A.L.R.2d 441 (1948). See Barrows v. Jackson, 346 U.S. 249 (1953); Hurd v. Hodge, 334 U.S. 24 (1948).

[27] It is settled that the judiciary, as a branch of the state, cannot transgress the guaranties of the first amendment, for this is state action within the meaning of the fourteenth amendment. Bridges v. State, 314 U.S. 252 (1941). The constitutional thesis on the federal level is discussed in Lynch v. Uhlenhopp, *supra* note 14, and in Pfeffer, *supra* note 4.